

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-218453 DATE: May 6, 1985
MATTER OF: Mountaineer Leathers, Inc.

DIGEST:

1. Bid on total small business set-aside from a small business concern which indicates that not all supplies to be furnished will be the product of a small business concern properly is rejected as nonresponsive because bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.
2. Bid on total small business set-aside rejected as nonresponsive because bidder indicated that not all supplies to be furnished will be the product of a small business concern may not be cured or defect waived as a minor informality since responsiveness must be determined from material available at bid opening and postopening explanations cannot be considered to correct a nonresponsive bid.

Mountaineer Leathers, Inc. (Mountaineer), protests the rejection of its bid as nonresponsive under Defense Logistics Agency (DLA) invitation for bids (IFB) No. DLA100-85-B-0262, a small business set-aside. Mountaineer's bid was rejected because it indicated that not all supplies to be furnished would be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico.

We dismiss the protest. We do so without obtaining a report from the contracting agency since it is clear from the information provided by Mountaineer that the protest is without legal merit and therefore does not state a valid basis for protest. See Hauser Products Inc., B-218140, Feb. 22, 1985, 85-1 C.P.D. ¶ 227; ATD-American Co., B-217290, Jan. 23, 1985, 85-1 C.P.D. ¶ 91; 4 C.F.R. § 21.3(f) (1985).

The solicitation contained the usual Small Business Concern Representation. Mountaineer indicated in that

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representation that it was a small business concern, but that "not all supplies to be furnished will be manufactured or produced by a small business concern in the United States, its possessions or Puerto Rico." As a result, the contracting officer rejected the bid as nonresponsive.

Mountaineer indicates that it completed the representation as it did because it interpreted the words "all supplies" to include the component parts that are used in manufacturing the end item. Mountaineer therefore feels the solicitation provision is ambiguous and its misinterpretation in responding to the representation should be waived as a minor informality.

While we have held that the failure to complete the small business size status portion of the representation is a waivable minor informality, Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 C.P.D. ¶ 629, we have distinguished this from the second portion of the representation which concerns a matter of responsiveness because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies. If a bid on a small business set-aside fails to establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business, the bid is nonresponsive and must be rejected. Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 C.P.D. ¶ 467. In other words, to be responsive to a solicitation for supplies in a small business set-aside, there must be an enforceable legal obligation created in the bid that the bidder, if awarded the contract, will furnish supplies manufactured by small businesses. Otherwise, the government's acceptance of the bid would not legally obligate the contractor to furnish small business products consistent with the set-aside. See Automatics Ltd., B-214997, Nov. 15, 1984, 84-2 C.P.D. ¶ 535. See also Hauser Products Inc., B-218140, supra; ATD-American Co., B-217290, supra; and Wippette International Inc., B-216304, Sept. 18, 1984, 84-2 C.P.D. ¶ 322.

The responsiveness of the bid must be determined from the material available at bid opening, and postopening explanations cannot be considered to correct a nonresponsive bid, even if a lower price could be obtained by accepting the corrected bid. Basic Marine Inc., B-215236, June 5, 1984, 84-1 C.P.D. ¶ 603. Thus, information outside the bid itself may not be offered by the bidder after bid opening as a basis to waive or otherwise cure the bidder's failure to make the proper certification in the bid. Mechanical Mirror Works, Inc., B-210750.2, supra.

Accordingly, since Mountaineer's intent was not clearly ascertainable from the face of the bid, the contracting officer properly rejected the bid as nonresponsive.

The protest is dismissed.

Mountaineer asserts that it misinterpreted the Small Business Concern Representation clause used in the solicitation and it contends that the clause invites confusion of the raw materials and component parts used in an item with the "supplies" being furnished under the contract. Mountaineer suggests that the clause be changed to refer to "end items" rather than to "supplies," to avoid confusion among bidders in the future. Although the law in this situation is well-settled and does not provide a basis for accepting Mountaineer's bid, there have been a number of recent cases--such as those cited throughout this decision--in which bidders have alleged that they submitted nonresponsive bids through misinterpreting the Small Business Concern Representation clause (Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984)). We are, therefore, by letters of today, expressing our concern to the FAR Secretariat and to the Administrator, Small Business Administration, that this may be an appropriate matter for review and consideration of clarifying changes to the wording of the Small Business Concern Representation clause.

Harry R. Van Cleve

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General Counsel